IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (C) No. 994 of 2019

IN THE MATTER OF

SAMASTHA KERALA JAMIATHUL ULEMA

...PETITIONER

VERSUS

UNION OF INDIA ...RESPONDENT

COUNTER AFFIDAVIT
ON BEHALF OF UNION OF INDIA

I, [redacted] currently working as [redacted], Legislative Department, Ministry of Law and Justice , do hereby solemnly affirm and state as follows:

1. That I am authorised to file this Counter Affidavit on behalf of the sole Respondent, in the aforesaid matter, in official capacity. On the basis of the available. official record, I am fully conversant with the facts of the present case, hence competent to swear to this affidavit. The present affidavit is on the basis of information derived from the official records maintained by the Department.

2. That I have read the contents of the Writ petition and other attached documents and I say that the contents therein to the extent they are inconsistent with the submission hereinafter made in this counter-affidavit, are incorrect and are denied, unless any averment or contention is specifically admitted or traversed, the same may treated as denied.

3. That I have perused the present writ petition filed by the petitioner and in reply, humbly submit that the present petition is liable to be dismissed in view of the following submissions:

PRELIMINARY SUBMISSIONS AND BRIEF FACTS

4. The petitioner has filed, inter alia, the writ petition with a prayer before this Hon'ble Court for issuance of a Writ, order or direction in the nature of mandamus declaring that the Muslim Women (Protection of Rights on Marriage) Act, 2019 as unconstitutional and violative of Article 14, 15, 21 and 123 of the Constitution of India.

5. It is submitted that in catena of decisions, this Hon'ble Court while considering the validity of legislation has time and again held that a legislation passed by the Parliament can be set aside only on constitutionally recognised grounds, namely, grounds of legislative competence and whether the legislation is ultra vires the provisions of the Constitution or the same violates

fundamental rights or any other provisions of the Constitution. The impugned Act is a piece of legislation in the backdrop of the aforesaid law and is intra vires the provisions of the Constitution.

6. At the outset it is submitted that the impugned Act provides that the practice of *'talaq-e-biddat'* which was set aside by the Constitution Bench of this Hon'ble Court in the matter of ***Shayara Bano Vs. Union of India and Others*** reported in **(2017) 9 SCC 1** (hereinafter referred to as "**Shayara Bano case**") to be made punishable as it violates the fundamental rights and the rights of equality guaranteed to a woman under the Constitution. A copy of the Judgment passed by the Hon'ble Supreme Court in Shayara Bano Vs. Union of India and Others reported in (2017) 9 SCC 1 is annexed hereto and marked as ANNEXURE R-1 (PAGE NO 23.TO 399)

7. Further, at this juncture it is also relevant to mention that one Mr. Shahid Azad, challenged the validity of the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 (Ord. 7 of 2018) which was in similar lines of the impugned Act, before the Honorable High Court of Delhi, wherein vide its judgment dated the 28th September, 2018, the Hon'ble High Court dismissed the Writ petition (Civil) No. 10341 of 2018. Copy of the judgment dated the 28th September, 2018, passed by the Hon'ble High Court of Delhi in Writ petition (Civil) No. 10341 of

2018 is annexed hereto and marked as ANNEXURE R-2 (PAGE NO 400.TO 412)

8. It is submitted that in spite of the Hon'ble Constitution Bench's Judgment in Shayara Bano case, thereby setting aside the practice of *talaq-e-biddat,* and the assurance of All India Muslim Personal Law Board, there have been reports of divorce by way of *talaq-e-biddat* from different parts of the country. It was seen that setting aside *talaq-e-biddat* by this Hon'ble Court has not worked as a sufficient deterrent in bringing down the number of divorces by this practice among certain Muslims.

9. Therefore, it was felt that there is need for State action to give effect to the order of this Hon'ble Court and to redress the grievances of victims of illegal divorce. Accordingly, to protect the rights of married Muslim women who are being divorced by way of triple talaq, a Bill, namely, the Muslim Women (Protection of Rights on Marriage) Bill, 2017, was introduced in, and passed by, the Lok Sabha on the 28th December, 2017 and was pending in Rajya Sabha.

10. The aforesaid Bill proposed to declare the practice of triple *talaq* as *void* and illegal and made it an offence punishable with imprisonment up to three years and fine, and triable by a Judicial Magistrate of the First Class. It was also proposed in that Bill to provide subsistence allowance to married Muslim women and dependent children and also for the custody of

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minor children. The Bill further provided to make the offence cognizable and non- bailable. However, apprehensions were raised in and outside Parliament regarding the provisions of the pending Bill which enabled any person to give information to an officer in charge of a police station to take cognizance of the offence and making the offence non-bailable.

11. In order to address the above concerns, it was decided to make the offence cognizable, if the information relating to the commission of an offence is given to an officer in charge of a police station by the married Muslim women upon whom *talaq* is pronounced or any other person related to her by blood or marriage. It was also decided to make the offence non-bailable and compoundable at the instance of the married Muslim women with the permission of the Magistrate, on such terms and conditions as he may determine.

12. As the Bill was pending for consideration in Rajya Sabha and the practice of divorce by triple *talaq* (i.e. *talaq-e-biddat)* was continuing, there was an urgent need to take immediate action to prevent such practice by making stringent provisions in the law. Since both Houses of Parliament were not in session and circumstances existed which rendered it necessary for the President to take immediate action in the matter, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 (Ord. 7 of 2018), with aforesaid changes was promulgated on the

19.09.2018. A copy of the Ordinance dated 19.09.2018 is annexed hereto and marked as **ANNEXURE R-3** (PAGE NO 413 TO 416)

13. In order to replace the said Ordinance, the Muslim Women (Protection of Rights on Marriage) Bill, 2018 was introduced in the Lok Sabha on 17th December, 2018 and was passed by that House on the 27th December, 2018. However, the Bill could not be taken up for consideration in Rajya Sabha as both the Houses of the Parliament were adjourned. As both Houses of Parliament were not in session and the practice of divorce by triple *talaq* (i.e. *talaq-e-biddat)* was continuing, to give continued effect to the provisions of the aforesaid Ordinance, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 (Ord. 1 of 2019) was promulgated on the 12th. January, 2019. Copy of the Ordinance dated 12th January, 2019 is annexed hereto and marked as **ANNEXURE R-4** (PAGE NO 417 TO 421).

14. Subsequently, to replace the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019, necessary official amendments to the Muslim Women (Protection of Rights on Marriage) Bill, 2018 were moved in Rajya Sabha. However. the Bill could not be taken up for consideration in Rajya Sabha as both Houses were adjourned. Since both Houses of the Parliament were not in session, to give continued effect to the provisions of the aforesaid Ordinance, The Muslim Women

(Protection of Rights on Marriage) Second Ordinance, 2019 (Ord. 4 of 2019) was promulgated on the 21st February, 2019. A copy of the Second Ordinance; 2019 (Ord. 4 of 2019) dated 21st February, 2019 is annexed hereto and marked as ANNEXURE R-5 (PAGE NO 422 TO 427)

15. Thereafter, the Sixteenth Lok Sabha was dissolved on the 25th May, 2019 and the Muslim Women (Protection of Rights on Marriage) Bill, 2017 and the Muslim Women (Protection of Rights on Marriage) Bill, 2018 pending in Rajya Sabha lapsed. Accordingly, to replace the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019, the Muslim Women (Protection of Rights on Marriage) Bill, 2019 was introduced in Parliament was enacted as the Muslim Women (Protection of Rights on Marriage) Act, 2019 (20 of 2019) on the 31st July, 2019. A copy of the Muslim Women (Protection of Rights on Marriage) Act, 2019 (20 of 2019) is annexed hereto and marked as ANNEXURE R-6 (PAGE NO 428 TO 430).

16. In view of the aforesaid facts, it is submitted that the Parliament in its wisdom has enacted the impugned Act to protect the rights of married Muslim women who are being divorced by triple *talaq*. The impugned Act helps in ensuring the larger constitutional goals of gender justice and gender equality of married Muslim women and helps subserve their fundamental rights of non-discrimination and empowerment.

17. It is respectfully submitted that this Hon'ble Court has consistently held that the Court cannot go into the wisdom of the measure, but only its constitutionality of legislation. Likewise, the Court is only concerned to interpret the law and if it is valid, to apply the law as it finds it and not to enter upon a discussion as to what the law should be. It is further acknowledged and upheld by this Hon'ble Court repeatedly that it is the function of the Legislature alone to determine what is and what is not good and proper for the people of the land and they must be given widest latitude to exercise their functions within the limit of their powers else all progress is barred.

18. It is further submitted that when this Hon'ble Court in the matter of Shayara Bano case, in a majority judgment of 3:2, had set aside the practice of *talaq-e-biddat* (three pronouncements of *talaq*, at one and the same time.) by certain Muslim husbands to divorce their wives and if such an act is declared to be an offence punishable under law, with due deference, this Hon'ble Court ought not to interfere into the ,legislative enactment of making punishable such a manifestly arbitrary act which is already declared under law to be violative of Article 14 of the Constitution. In this regard, attention of the Hon'ble Court is invited *to* clause (1) of article 142 of the Constitution which reads as follows:-

> *"142. **Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc.-** (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make ·such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as n1ay be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."*

Thus, the impugned Act is a piece of legislation made by the Parliament to implement the decision laid down by this Hon'ble Court. In view of this, the Writ petition deserves to be dismissed *in limine*.

19. It is submitted that when this Hon'ble Court in a majority decision had set aside the practice of *talaq-e-biddat* (three pronouncements of *talaq*, at one and the same time.) by certain Muslims husbands to divorce their wives and as the victims of *talaq-e-biddat* have no option but to approach the police for redressal of their grievances and the police were helpless as no action could be taken against their husbands in the absence of punitive provisions in the law. Therefore, in order to prevent the aforesaid practice, it was felt that there was an urgent need for stringent provisions in the law which act as a deterrent to Muslim husbands divorcing their wives by adopting instantaneous and irrevocable *talaq*. Accordingly, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 under article 123 of the Constitution was promulgated by the

President on 19.09.2018 and was later enacted as the Muslim Women (Protection .of Rights on Marriage) Act, 2019.

20. It is submitted that defining offences and prescribing appropriate penalties is a core function of the State. Whether or not a particular type of conduct ought to be criminalised, and what punishment is to be imposed for such conduct is to be determined by the legislature in light of the prevailing social circumstances. Whether a particular type of conduct warrants treatment as a civil wrong or a criminal offence is a determination which cannot be made by the Courts. In ***Kartar Singh v. State of Punjab*, (1994) 3 SCC 569** it has been held:

> *446. What is a crime in a given society at a particular time has a wide connotation as the concept of crime keeps on changing with change in political, economic and social set-up of the country. Various legislations dealing with economic offences or offences dealing with violation of industrial activity or breach of taxing provision are ample proof of it. The Constitution-makers foresaw the eventuality, therefore they conferred such powers both on Central and State Legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Use of the expression, "including all matters included in the Penal Code, 1860 at the commencement of the Constitution" is unequivocal indication of comprehensive nature of this entry. It further empowers the legislature to make laws not only in respect of matters covered by the Penal Code, 1860 but any other matter which could reasonably and justifiably be considered to be criminal in nature. Terrorist or disruptive activity is criminal in content, reach and effect. The Central and State Legislature both, therefore, are empowered to legislate in respect of such an activity in exercise of the power conferred under Entry 1 of the Concurrent List. But this wide power is otherwise controlled and restricted by the latter*

part of the entry. It carves out an exception by precluding either of the legislatures from exercising the power if it is in respect of "offence against laws with respect to any of the matters specified in List I or II". The controversy, narrows down to whether the offences under the TADA are such in respect of which the State Legislature could make a law. In other words if the legislation relating to TADA can fall in Entry 1 of List II then the State Legislature would have competence to make a law under this entry and create offences for violation of such law under Item 64 of List II and the Central Legislature would be precluded from making any law. But that would happen if it is held that law relating to TADA is either in fact or in pith and substance a law relating to, 'public order'. This expression was construed in Romesh Thappar v. State of Madras [1950 SCC 436 : 1950 SCR 594 : AIR 1950 SC 124 : 51 Cri LJ 1514] . It was held:

"Now 'public order' is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted."

In Ram Manohar Lohia v. State of Bihar [(1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608] it was observed as under:

"It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State', 'law and order' also comprehends disorders of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State."

Can it be said that offences dealt under TADA relate to public order? Is the distinction between public order as visualised in Entry 1 List II and TADA of degree only or are they substantially different? "Terrorism constitutes a direct repudiation of liberal and human values and principles, and that terrorist ideology is … and constantly deployed in a struggle to defame and discredit democracy." The terrorism with which our country is faced has

> *been described as explained earlier is sponsored terrorism. Terrorism whether it is sponsored or revolutionary or even political by its nature cannot be considered to be public order as explained by this Court. Conceptually public order and terrorism are different not only in ideology and philosophy but also in cause or the mens rea, the manner of its commission and the effect or result of such activity. Public order is well understood and fully comprehended as a problem associated with law and order. Terrorism is a new crime far serious in nature, more graver in impact, and highly dangerous in consequence. One pertains to law and order problem whereas the other may be political in nature coupled with unjustifiable use of force threatening security and integrity of the State. The submission thus advanced on legislative competence, more as a matter of form than with any feeling of conviction and belief in its merit, does not appear to be sound."*

21. It is also submitted that it has also been consistently observed by this Hon'ble Court that while considering the validity of the law, the Court cannot say whether less than what was done might have been enough, whether more drastic provisions were made than occasion demanded, whether the same purpose could have been achieved by provisions differently framed or by other means which are relevant considerations.

22. Furthermore, the argument relating to vagueness of the impugned Act is wholly without merit. It is now well established that a law can be called vague only when it is not based on an "adequately determining principle". The determining principle of the impugned law is plain on its face. It seeks to criminalise a practise which had neither legal nor religious sanction and was discriminatory toward women. Triple talaq allowed for instantaneous voiding of the marital tie

and released the husband from any obligation toward his wife. Essentially, this practice legitimised and institutionalised abandonment of wives by their husbands. The practice did not simply result in a private injury but in a public wrong as it militated against the rights of women and the social institution of marriage itself.

23. It is submitted that where *Shayara Bano* case itself has held the practice of triple talaq to be manifestly arbitrary, it cannot be argued that a law criminalising the practice is manifestly arbitrary. The animating principle of the impugned law itself comes from the finding in *Shayara Bano* case that triple talaq is neither Islamic nor legal as can be seen from the law's Statement of Objects and Reasons. *Shayara Bano* case already recognised triple talaq as an aberrant practice. All that the impugned law does is provide for sanctions to enforce deterrence against following of the practice. This can by no means be called arbitrary and is in fact the very essence of criminal law.

24. Furthermore, there is no basis to the claim that marriages being under personal law, they are exempt from the application of the general criminal law. Marriages are a social institution which the State has a special interest in protecting. It is beyond doubt that the state can protect the stability of marriages by resort to the device of criminal law. Enactments such as the Domestic Violence Act, 2005, the Dowry Prohibition Act, 1961 etc are all

enacted under the same general principle as the present law i.e. preserving the sanctity of the institution of marriage. In fact, this has been recognised in the case of ***Joseph Shine v. Union of India*, (2019) 3 SCC 39** as follows:

> **49.** *Another aspect needs to be addressed. The question we intend to pose is whether adultery should be treated as a criminal offence. Even assuming that the new definition of adultery encapsules within its scope sexual intercourse with an unmarried woman or a widow, adultery is basically associated with the institution of marriage.* ***There is no denial of the fact that marriage is treated as a social institution and regard being had to various aspects that social history has witnessed in this country, Parliament has always made efforts to maintain the rights of women. For instance, Section 498-A IPC deals with husband or relative of husband of a woman subjecting her to cruelty. Parliament has also brought in the Protection of Women from Domestic Violence Act, 2005. This enactment protects women. It also enters into the matrimonial sphere.*** *The offences under the provisions of the said enactment are different from the provision that has been conceived of under Section 497 IPC or, for that matter, concerning bringing of adultery within the net of a criminal offence.*
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> **59.** *Let it be clearly stated, by no stretch of imagination, one can say, that Section 498-A or any other provision, as mentioned hereinbefore, also enters into the private realm of matrimonial relationship.* ***In case of the said offences, there is no third party involved. It is the husband and his relatives.*** *There has been correct imposition by law not to demand dowry or to treat women with cruelty so as to compel her to commit suicide. The said activities deserve to be punished and the law has rightly provided so."*

It is to be specifically noted that the distinguishing feature relied on by the Court to justify these laws was the fact that they pertained only to the husband and his relatives. The present law stands on exactly the same footing as criminal liability attaches to the husband alone.

25. It is submitted that the petitioners attempt to argue that since the practice of triple talaq has no legal effect after *Shayara Bano* case, it cannot be criminalised. The argument appears to be that since the criminal conduct engaged in had no advantageous legal effect for the perpetrator, it cannot be a crime. This argument turns the principle of penal laws on their head. In plain terms, Petitioners are essentially attempting to argue that the Act ought not to be criminalised because the attempted illegal conduct was not successful in its object. In doing so, petitioners have overlooked the very basis of criminal law. If sanctions did not exist, the prohibition on criminal conduct itself would become a dead letter to be freely disregarded.

26. It is further submitted that if the petitioners agree that the pronouncement of *talaq-e-biddat* would have no legal effect and consequence and in fact, is manifestly arbitrary after the judgment in *Shayara Bano,* the petitioners or any other law-abiding citizen of the country ought not to have any grievance with the criminalisation of the said manifestly arbitrary action, as declared by this Hon'ble Court.

27. In view of the aforesaid, it is submitted that by the impugned Act, the pronouncement of *talaq-e-biddat* (three pronouncement of *talaq* at one and the same time) by Muslim husbands which has been set aside by this Hon'ble Court has been made a punishable offence by the legislature in its wisdom. The Act and

the averments of the Petitioner that the impugned Act is violative of articles 14, 15, 21 and 25 of the Constitution is devoid of merit, frivolous, baseless and hence the petition is liable to be dismissed.

28. In *Shyara Bano* case, this Hon'ble Court had expressly noted that the practice of triple talaq could not be justified with reference to the tenets of Islam. Kurian Joseph, J, as he then was, in his opinion, held as follows;

> *"15. There is also a fruitful reference to two judgments of the Kerala High Court — one of Krishna Iyer, J. in A. Yousuf Rawther v. Sowramma [A. Yousuf Rawther v. Sowramma, 1970 SCC OnLine Ker 49 : AIR 1971 Ker 261] and the other of V. Khalid, J. in Mohd. Haneefa v. Pathummal Beevi [Mohd. Haneefa v. Pathummal Beevi, 1972 SCC OnLine Ker 80 : 1972 KLT 512] . No doubt, Sowramma [A. Yousuf Rawther v. Sowramma, 1970 SCC OnLine Ker 49 : AIR 1971 Ker 261] was not a case on Triple Talaq, however, the issue has been discussed in the judgment in paras 7 & 8 which have also been quoted in Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] : (Sowramma case [A. Yousuf Rawther v. Sowramma, 1970 SCC OnLine Ker 49 : AIR 1971 Ker 261] , SCC OnLine Ker)*
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> *7. … The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. …*
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> *8. … It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. 'The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them".' (Quran IV:34). The Islamic 'law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple*

caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously'. ... ***Commentators on the Quran have rightly observed—and this tallies with the law now administered in some Muslim countries like Iraq—that the husband must satisfy the court about the reasons for divorce. However, Muslim Law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quran laid down and the same misconception vitiates the law dealing with the wife's right to divorce****. ..." (Shamim Ara case [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] , SCC pp. 524-25, para 12)*

17. *After a detailed discussion on the aforementioned cases, it has been specifically held by this Court in Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] , at para 15 that: (SCC p. 527)*

"15. ... There are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq."

(emphasis supplied)

It has to be particularly noted that this conclusion by the Bench in Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] is made after "respectful agreement" with Jiauddin Ahmed [Jiauddin Ahmed v. Anwara Begum, (1981) 1 Gau LR 358] that: (Shamim Ara case [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] , SCC p. 526, para 13)

"13. ... ***talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected...."***

In the light of such specific findings as to how Triple Talaq is bad in law on account of not following the Quranic principles, it cannot be said that there is no ratio decidendi on Triple Talaq in Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] .

18.Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] has since been understood by various High Courts across the country as the law deprecating Triple Talaq as it

is opposed to the tenets of the Holy Quran. Consequently, Triple Talaq lacks the approval of Shariat.

27. Fortunately, this Court has done its part in Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] . I expressly endorse and reiterate the law declared in Shamim Ara [Shamim Ara v. State of U.P., (2002) 7 SCC 518 : 2002 SCC (Cri) 1814] . What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well. "

29. It is further submitted that this Hon'ble Court in the Shayara Bano case had further held as follows:-.

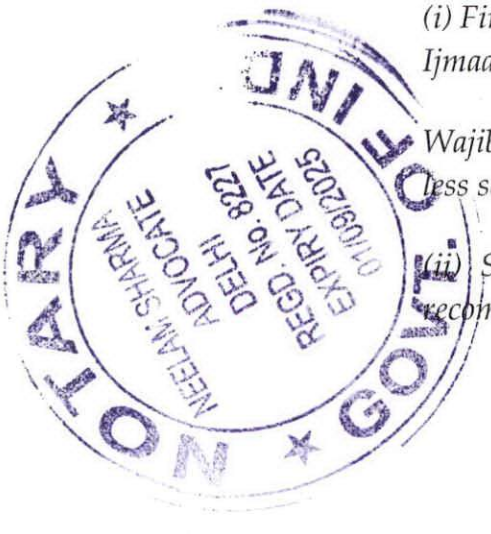
"54. Applying the aforesaid tests, it is clear that Triple Talaq is only a form of talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi School which tolerates it. According to Javed [Javed v. State of Haryana, (2003) 8 SCC 369] , therefore, this would not form part of any essential religious practice. Applying the test stated in Acharya Jagadishwarananda [Commr. of Police v. Acharya Jagadishwarananda Avadhuta, (2004) 12 SCC 770] , it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice. Indeed, Islam divides all human action into five kinds, as has been stated by Justice Hidayatullah in his introduction to Mulla. There it is stated:

"E. Degrees of obedience: Islam divides all actions into five kinds which figure differently in the sight of God and in respect of which His Commands are different. This plays an important part in the lives of Muslims.

(i) First degree: Fard. Whatever is commanded in the Koran, Hadis or Ijmaa must be obeyed.

Wajib. Perhaps a little less compulsory than Fard but only slightly less so.

(ii) Second degree: Masnun, Mandub and Mustahab: These are recommended actions.



> *stated that the correct law of talaq, as ordained by the Holy Quran, is: (i) that "talaq" must be for a reasonable cause and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.*

We are in respectful agreement with the above said observations made by the learned Judges of the High Courts.

***104**. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in Rashid· Ahmad (supra), such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after. Shamin Ara (supra). This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained Under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in-Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him."*

30. It is submitted that since this Hon'ble Court had declared that the procedure for divorce by adopting the system of triple *talaq* is unconstitutional and violative of the fundamental right guaranteed under the Constitution, the Parliament in its

(iii) Third degree: Jaiz or Mubah: These are permissible actions as to which religion is indifferent.

(iv) Fourth degree: Makruh: That which is reprobated as unworthy.

(v) Fifth degree: Haram: That which is forbidden."

55. Obviously, Triple Talaq does not fall within the first degree, since even assuming that it forms part of the Koran, Hadis or Ijmaa, it is not something "commanded". Equally talaq itself is not a recommended action and, therefore, Triple Talaq will not fall within the second degree. Triple Talaq at best falls within the third degree, but probably falls more squarely within the fourth degree. It will be remembered that under the third degree, Triple Talaq is a permissible action as to which religion is indifferent. Within the fourth degree, it is reprobated as unworthy. We have already seen that though permissible in Hanafi jurisprudence, yet, that very jurisprudence castigates Triple Talaq as being sinful. It is clear, therefore, that Triple Talaq forms no part of Article 25(1). *This being the case, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered under Article 25(1) of the Constitution.*

*"**102**. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq .which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in Fyzee's book (supra), The Hanafi school of 'Shariat Law, which itself recognizes this form of Talaq, specially states that though lawful it is sinful in that it incurs the wrath of God.*

*"**103**. Indeed, in Shamin Ara v. State of U.P., (2002) 7SCC 518, this Court after referring to a number of authorities including certain recent High Court judgments held as under:*

"13.. The correct law on talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's; if the attempts fail, talaq may be affected (para 13). In Rukia Khatun case (1981) 1 Gau LR 375, the Division Bench

wisdom is empowered to make it an offence and hence no unconstitutionality is involved in the matter. It is further submitted that if an act is found to be manifestly arbitrary and unconstitutional by this Hon'ble Court and if such an act is declared to· be an offence punishable under law, the Hon'ble Court cannot interfere with the legislative act of making punishable such arbitrariness already declared under law to be violative of the provisions of the Constitution.

31. Moreover, it is also settled law that the petitioner cannot seek the enforcement of negative equality by contrasting the punishment provided for under one law for wrongful action with others. As held in a plethora of cases, Article 14 cannot be used as a tool to enforce negative equality. The practice of Tala-e-biddat was held unconstitutional and a need was felt to have a standalone legislation to address the same. Therefore, the contentions of the petitioners that the present case ought to be equated with other forms of non-compliance and statutory violations in the process of divorce must be set aside at the outset, as this seeks the perpetuation of illegality which is not covered under Article 14. Reliance may be placed on *Chaman Lal v. State of Punjab, (2014) 15 SCC 715* and *Union of India v. International Trading Co. (2003) 5 SCC 437* and *Basawaraj v. Land Acquisition Officer, (2013) 14 SCC 81.*

32. The prayers as made for by the Petitioner are vehemently denied in totality and in view of the submissions made by the answering Respondent.

33. I further submit that the Respondent No. 1 reserves the right to file a more detailed affidavit with the leave of this Hon'ble Court, if necessary, at a later stage.

34. The present affidavit is bonafide and in the interest of justice.

[redacted]

VERIFICATION

I, the above-named deponent, do hereby verify the facts stated in Para 1 to 34 of my above affidavit are true and correct to the best of my knowledge and belief and no part of it is false and no material has been concealed therefrom.
Verified at New Delhi on this the _____ day of _____.

05 AUG 2024

I Identified the deponent who has signed in my presence

[redacted]

NOTARY
NEELAM SHARMA

[redacted]

[redacted]

05 AUG 2024